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NOV 14 1997

November 13, 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA FEDERAL EXPRESS

Ms. Magali Salas, Secretary
Federal Communications Commission
1919 N. Street, N.W., Room 222
Washington, D.C. 20554

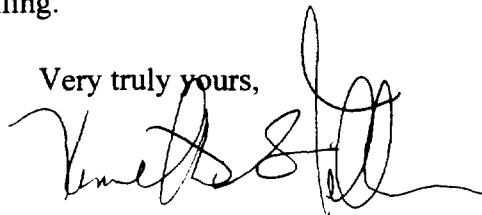
Re: WT Docket No. 97-197; ET Docket No. 93-62; RM-8577

Dear Ms. Salas:

Please find enclosed an original and nine copies of the Motion to Consider Supplemental Ex Parte Comments and Supplemental Ex Parte Comments of the City of Fountain, Colorado for filing in the above referenced proceeding.

Thank you for your attention to this matter. Please feel free to contact me at (303) 320-6100 if you have any questions regarding this filing.

Very truly yours,



Kenneth S. Fellman

KSF/eaj

Enclosure

cc: David Smedsrud
Deputy City Manager, Fountain

William Palmer, Esq.
Fountain City Attorney

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Procedures for Reviewing Requests for Relief)	
From State and Local Regulations Pursuant to)	WT Docket No. 97-197
Section 332(c)(3)(7)(B)(v) of the)	
Communications Act of 1934)	
)	
Guidelines for Evaluating the Environmental)	ET Docket No. 93-62
Effects of Radiofrequency Radiation)	
)	
Petition for Rulemaking of the Cellular)	
Telecommunications Industry Association)	
Concerning Amendment of the Commission's)	RM-8577
Rules to Preempt State and Local Regulation)	
of Commercial Mobile Radio Service)	
Transmitting Facilities)	

MOTION TO CONSIDER SUPPLEMENTAL EX PARTE COMMENTS

The City of Fountain, Colorado, a Colorado home rule municipality, by and through its attorneys Kissinger & Fellman, P.C., respectfully requests that the Commission allow the late filing and consideration of ex parte comments in this proceeding, and as grounds therefore states as follows:

1. The City of Fountain is a relatively small community, with a population of approximately 14,000. The City initially had no intent to comment in this proceeding, and ordinarily does not comment in proceedings of the Commission, due to budgetary constraints.

2. The City has just learned, however, that in comments filed by AT&T Wireless Services, Inc. on October 9, 1997, a section of the City's zoning ordinance was cited as an example

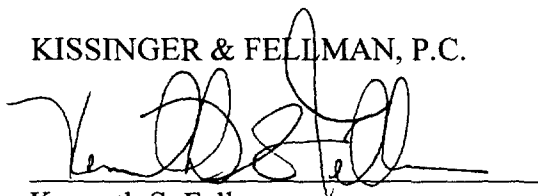
of unreasonable local government regulation which ought to be preempted. See, Comments of AT&T Wireless Services, Inc., October 9, 1997, page 6, n.9.

3. The City learned that its ordinance was cited in these proceedings only by chance. Upon review of the comments of AT&T Wireless Services, Inc., material omissions were made concerning the ordinance in question. The City seeks to submit supplemental ex parte comments at this time, to set the record straight regarding its zoning ordinance.

WHEREFORE, the City of Fountain respectfully requests that the Commission accept the filing of the supplemental ex parte comments, tendered with this motion, and take the City's position into account in its consideration of the manner in which local regulations address compliance with federal radio frequency emissions standards.

Respectfully submitted this 13th day of November, 1997.

KISSINGER & FELLMAN, P.C.

A handwritten signature in black ink, appearing to read 'Kenneth S. Fellman', is written over a horizontal line.

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Attorneys for the City of Fountain

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of November, 1997, a true and correct copy of the foregoing **MOTION TO CONSIDER SUPPLEMENTAL EX PARTE COMMENTS** was sent by U.S. Mail, postage prepaid, addressed to the following:

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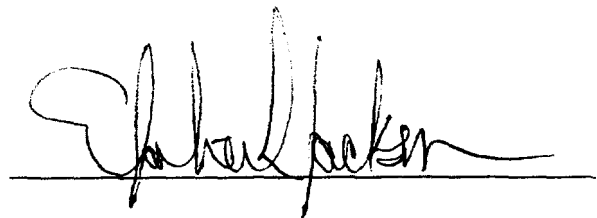
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Transmitting Facilities)	

**SUPPLEMENTAL EX PARTE COMMENTS OF
THE CITY OF FOUNTAIN, COLORADO**

The City of Fountain, Colorado, a Colorado home rule municipality, by and through its attorneys Kissinger & Fellman, P.C., submits these supplemental ex parte comments to the Commission in order to respond to the comments of AT&T Wireless Services, Inc., regarding the City's Zoning Ordinance.

1. In January, 1997, the City undertook a review of its zoning ordinance, with an expressed goal to revise and adopt a new zoning ordinance governing wireless telecommunications facilities within ninety (90) days. As part of the process, the City invited representatives of the wireless industry to meet with City officials and the City's consultant in the drafting of the new ordinance.

2. Industry representatives participated in the review and drafting process on behalf of AT&T Wireless Services, Inc., Western Wireless, Spring PCS, and US West Wireless.

3. The ordinance was adopted by the Fountain City Council on March 25, 1997. Section 17.19.040.2.E is titled "Radio Frequency Standards." As initially drafted, the Section required a report to be filed by the user of a facility six months after operations commenced, in order to verify compliance with federal RF emissions standards. The initial draft further provided that the City could retain its own qualified radio frequency engineer to verify the report, the cost of which would be incurred by the operator of the facility.

4. *At the request of some of the industry representatives*, Subsection 2.E was changed. Instead of requiring a mandatory test six months after operations commenced, *the industry representatives requested* that an applicant initially need only submit a project implementation report at the time of application which would provide cumulative field measurements of radio frequency emissions of all antennas to be installed at the site, with a comparison of those emissions to the federal standards. The industry representatives further suggested that they only be required to submit a report to the City indicating whether the RF emissions generated by the site are within federal standards, in response to a written complaint. Further, the industry representatives proposed that if the report in response to a written complaint indicated that the emissions were within allowable federal standards, that entity would not be required to prepare any similar report to written complaints for a reasonable period of time. The City suggested, and the industry representatives agreed, that this period of time in which no additional report was required would be one year from the date of the prior complaint. *This industry proposal* was acceptable to the City Staff, and was drafted into the final version of the new ordinance.

5. The industry representatives explained that the proposal to require an RF emissions report only in response to a complaint was a reasonable compromise because there may never be a complaint, and if there were continual complaints, the worst case scenario would involve an annual report which would not be unduly burdensome or expensive.

6. At the public hearing on March 25, 1997 before the Fountain City Council, representatives of the industry group that had worked on the ordinance publicly stated their appreciation for the opportunity to participate in the drafting of the ordinance, and for the work of City Staff. A representation was made to the Fountain City Council that the industry could work within the City of Fountain under the provisions of this ordinance. The only direct criticism of section 17.19.040.2.E came in the form of a letter from AT&T's legal counsel sent via facsimile on the afternoon of March 25, 1997, which suggested that the City had no authority to require any proof of compliance with federal RF emissions standards, and that all complaints must be directed to the Commission for investigation.

7. By sheer chance, the undersigned attorney who worked with the City in the drafting of this ordinance, was involved with a meeting on behalf of another Colorado city and representatives of the wireless telecommunications industry on November 5, 1997. When discussing provisions of that city's ordinance regarding compliance with federal radio frequency emissions standards and making reference to the provisions which the industry found acceptable in Fountain, the AT&T Wireless representative (who was also one of the AT&T Wireless representatives that worked on the Fountain ordinance) indicated that the Fountain ordinance was considered unacceptable, and was identified by AT&T Wireless Services in its comments before the

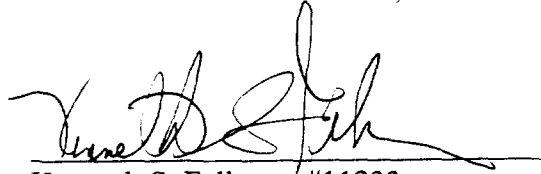
Commission. The City subsequently received a copy of those comments, and prepared these supplemental ex parte comments to set the record straight.

8. The City of Fountain is familiar with the Local and State Government Advisory Committee Advisory Recommendation No. 2 dated June 27, 1997. This Advisory Recommendation suggests that the Commission adopt a rule that requires notification to governmental entities cited in FCC proceedings as examples of the need for federal preemption. Fountain's situation highlights the reasons why such a rule is necessary. It is unfortunate that industry representatives can work with City Staff, propose language in zoning ordinance, publicly approve of the final ordinance, only to cite the very language that it proposed in support of preemption in comments before the Commission.

9. As the Commission considers the industry argument that compliance requirements in ordinances such as Fountain's are unreasonable, the Commission should likewise understand that, at least in the case of the City of Fountain, those requirements were suggested by the wireless industry representatives, who later represented to the Fountain City Council that its new ordinance, was reasonable and appropriately balanced the needs of the City with the needs of the wireless telecommunications industry.

Respectfully submitted this 13th day of November, 1997.

KISSINGER & FELLMAN, P.C.



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Attorneys for the City of Fountain

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of November, 1997, a true and correct copy of the foregoing **SUPPLEMENTAL EX PARTE COMMENTS OF THE CITY OF FOUNTAIN, COLORADO** was sent by U.S. Mail, postage prepaid, addressed to the following:

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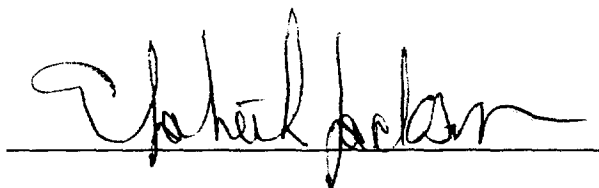
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